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Supreme Court of the United States

No. 877.

OCTOBER TERM, 1943.

H. HIGHFILL AND VALLEY CREDIT COMPANY, A
CORPORATION, PETITIONERS,

VS.

LULU J. DILATUSH, RESPONDENT.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT AND BRIEF IN
SUPPORT THEREOF.**

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Memphis, Tennessee,
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CORPORATION, PETITIONERS,

VS.

LULU J. DILATUSH, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable, The Chief Justice and the Associate
Justices of the Supreme Court of the United States:

Your petitioners, H. Highfill, a resident and citizen
of the Eastern District of Arkansas, and Valley Credit
Company, a corporation organized under the laws of Mis-
souri, and domiciled therein, pray this Court for the is-
sance of a Writ of Certiorari to the Circuit Court of
Appeals for the Eighth Circuit, to review a final judg-
ment of said Circuit Court of Appeals reversing an order
and judgment of the District Court of the United States
for the Jonesboro Division of the Eastern District of Ar-
kansas.

The judgment of the Circuit Court of Appeals was rendered on the 2d day of February, 1944, and petition for rehearing was by said Court denied on the 1st day of March, 1944.

I.

STATEMENT OF THE MATTER INVOLVED.

Respondent Lulu J. Dilatush, a resident and citizen of Illinois, sued these petitioners and her son R. E. Dilatush, a resident and citizen of the Eastern District of Arkansas, of which District Petitioner H. Highfill is also a resident and citizen, in the District Court of the United States for the Jonesboro Division of the Eastern District of Arkansas. She alleged that by false and fraudulent representations defendants had secured from her certain notes aggregating \$23,000 which had been executed by her said son, promising to foreclose the deed of trust securing these notes and then give her new security or to pay the notes; that the land (security) had been sold and she had not been paid.

Petitioners moved the District Court for a re-alignment of parties because there was no actual controversy between the plaintiff (respondent Lulu J. Dilatush) and defendant R. E. Dilatush; that he was a resident and citizen of the same state (Arkansas) as his co-defendant H. Highfill.

The depositions of Lulu J. Dilatush and R. E. Dilatush were taken by petitioners; the deposition of H. Highfill by respondent, and respondent's attorney J. Clifton Banta testified in open court. From undisputed facts the District Court found (Tr. 14):

"1. The plaintiff Lulu J. Dilatush is the mother of defendant R. E. Dilatush.

2. Defendant R. E. Dilatush is insolvent.

3. Defendant R. E. Dilatush is the one who has taken all active steps in the institution and prosecution of this suit. He selected his own personal lawyer to represent his mother, the plaintiff, first interviewed him about the employment, held numerous conferences with him about it, gave him access to his files, furnished such other information as was necessary to the bringing of this suit and its prosecution, and returned from California to testify on behalf of the plaintiff.

4. Defendant R. E. Dilatush is a citizen of the same state as the defendant H. Highfill, to-wit: the State of Arkansas.

5. All the interest that R. E. Dilatush has in this suit is upon the side of the plaintiff, and any possible benefit that might accrue to him, if any, would be dependent upon the success of the plaintiff in securing and collecting a judgment.

6. Defendant R. E. Dilatush was a member of the partnership with H. Highfill, which partnership is an issue in this suit.

7. There is no collision or conflict of interest between the plaintiff Lulu J. Dilatush and defendant R. E. Dilatush."

From these facts, the Court concluded the law to be that re-alignment of the parties was necessary, placing the son R. E. Dilatush with his mother as plaintiff; that this destroyed diversity of citizenship; and that the suit must be dismissed for want of jurisdiction, which was done (Tr. 15).

The Circuit Court of Appeals held that notwithstanding the activity of defendant R. E. Dilatush in behalf of the plaintiff, the fact that he owed her and she was entitled to take a judgment against him constituted a "con-

troversy" within the purview of Section 24, Judicial Code, 28 U. S. C. A. 41, Par. 1, and a "conflict of interest" (Tr. 47, 54).

The conviction that this declaration of law is contrary to the decisions of this Court, and of other Circuit Courts of Appeal is the basis for this petition.

II.

REASONS FOR GRANTING THE WRIT.

(a) The decision of the Circuit Court of Appeals is in conflict with the applicable decisions of the Supreme Court:

1. In holding that "as each and all of them have failed and refused to pay, it is manifest that controversy exists between her and each of them, and it is immaterial whether the controversy arises from defendants' denial of liability, or from their unwillingness to pay or from their inability to do so, or from all such causes" (Tr. 53).

Indianapolis v. Chase National Bank, 314 U. S. 63, 72, 86 L. Ed. 47, 51.

2. In holding as contrary to the evidence the finding of the trial court that there was no collision or conflict of interest between the plaintiff and her son (Tr. 54).

Indianapolis v. Chase National Bank, supra.

3. In holding that a suit "by one who charges refusal by another to pay a debt claimed to be due from him, presents the conflict of interest that constitutes a controversy between the party plaintiff and the party defendant under the Statute. 28 U. S. C. A. 41, Par. 1" (Tr. 54).

Dawson v. Columbia Avenue Savings Fund, etc., Co., 197 U. S. 178, 49 L. Ed. 713.

Indianapolis v. Chase National Bank, supra.
Niles-Bement-Pond Company v. Iron Moulders Union, 254 U. S. 77, 65 L. Ed. 145.
Steele v. Culver, 211 U. S. 26, 53 L. Ed. 74.

4. In holding that R. E. Dilatush "has no interest on the plaintiff's side in the law suit his mother has brought against him and others to justify aligning him on her side as a party plaintiff" (Tr. 54).

Dixie Cotton Oil Co. v. Morris, 79 Ark. 113, 94 S. W. 933.

Garner v. Hallum, 169 Ark. 295, 273 S. W. 1025.

(b) The Circuit Court of Appeals has so far departed from accepted procedure in an important matter affecting procedure generally throughout the country, as to call for the exercise of the power of supervision by the Supreme Court.

Dawson v. Columbia Avenue Saving Fund, etc., Co., supra.

De Graffenreid v. Yount-Lee Oil Co., (5 Cir.) 30 F. 2d 574.

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State Farm Mutual Automobile Ins. Co. v. Hugee, (4 Cir.) 115 F. 2d 293, 300, 132 A. L. R. 188.

United States v. Johnson, 319 U. S. 302, 87 L. Ed. 1413.

Wherefore, your petitioners pray that a Writ of Certiorari issue under the seal of this Court, directed to the Honorable Circuit Court of Appeals for the Eighth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket No. 12716 Civil, "Lulu J. Dilatush, Appellant, vs. H. Highfill, Valley Credit Company, a corporation, and R. E. Dilatush, Appellees," to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by this Court, and for such further relief as to this Court may seem proper.

ARCHER WHEATLEY,
Jonesboro, Arkansas,
Attorney for Petitioners.

Dated April 7, 1944.

